19-1871

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

JOHN DOE,

Plaintiff-Appellee,

v.

TRUSTEES OF BOSTON COLLEGE,

Defendant-Appellant.

On Appeal from a Judgment of the
United States District Court for the District of Massachusetts

BRIEF FOR PLAINTIFF-APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Plaintiff-Appellee John Doe is an individual to whom Rule 26.1 of the Federal Rules of Appellate Procedure does not apply.

PRELIMINARY STATEMENT

John Doe ("Doe") was suspended for one year from Boston College ("BC"), based on BC's finding that Doe violated its student policy prohibiting sexual penetration without affirmative consent. Doe denied engaging in such conduct and was shocked that an entirely consensual sexual encounter with a fellow student led to a sexual misconduct allegation. To find Doe responsible for violating its policy, BC used a process that lacked any opportunity to have questions put to his accuser at any kind of hearing. BC also failed to give him notice of the charge that led to his suspension, and denied him a chance to present newly available exculpatory evidence.

State contract law requires institutions of higher education to treat their students with *basic fairness* in adjudicating disciplinary charges, whether or not a university makes that promise explicitly. *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 87 (1st Cir. 2018). BC's student conduct code also explicitly promises to "assure fundamental fairness to the complainant and to the respondent." A.278[1]. This case concerns what the fairness owed to parties consists of in a university's discipline process.

[1] Citations to "A." are to the Record Appendix and the Sealed Record Appendix filed in this matter.

In *Haidak v. University of Massachusetts-Amherst*, this Court unequivocally stated that "a university" cannot "fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account," and specified that "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" 933 F.3d 56, 69 (1st Cir. 2019). Those clear statements about what fair adjudication requires of a university came in a case involving a public university's adjudication of allegations of assault and harassment within two students' romantic relationship. Now, BC insists that because private universities are not directly governed by the Due Process Clause as public universities are, the content of the "basic fairness" or "fundamental fairness" that is legally required of a private university must be significantly different from – and drastically less than – what due process requires of a public university in this jurisdiction. But amidst the varying features of private universities and public universities and the procedures they employ, one way that they do not reasonably diverge is in the minimum demands of the *fairness* they must provide to students. Of course, the Due Process Clause is not the source of law for students' rights against private universities, but the minimum content of basic fairness undergirds *both* public schools' constitutional due process obligations and private schools' contractual fairness obligations to students. A concept as fundamental as "basic fairness" does not properly split into a

greater and a lesser obligation, for two schools and students across town from each other but facing the same situation. The minimum procedural features that this Court indicated are needed in order "to say that a university can fairly adjudicate a serious disciplinary charge," *id.* at 69, are part of the basic fairness owed by any institution of higher education.

The unlawfulness of the unfair process that BC used for suspending Doe was so manifest, and the irreparable harm so clear, that the District Court granted a preliminary injunction from the bench, staying the suspension and allowing Doe to continue his studies at BC while his lawsuit under Title IX and state law proceeds. A.427-442. The District Court's ruling on Doe's likelihood of success on the merits is in accord with cases from across the country, involving schools both public and private, in both federal and state courts. Other jurisdictions have found, as this Court did in *Haidak*, that for "a university" to "fairly adjudicate a serious disciplinary charge," there must be some "mechanism for confronting the complaining witness and probing his or her account" and "some opportunity for real-time cross-examination, even if only through a hearing panel." *Haidak*, 933 F.3d at 69. The absence of any such mechanism or opportunity makes a university's adjudication, particularly where credibility is at issue and serious discipline is at stake, fundamentally unfair. *See id*; *see also Doe. v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Doe v. Brandeis Univ.*, 177 F.Supp.3d 561, 604-05 (D. Mass. 2016); *Doe v.*

Allee, 30 Cal. App. 5th 1036, 1039 (Cal. Ct. App. 2019); *Doe v. Univ. of So. Cal.*, 29 Cal. App. 5th 1212 (Cal. Ct. App. 2018); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1057 (Cal. Ct. App.2018); *Doe v. Rhodes Coll.*, No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019).

STATEMENT OF THE CASE

I. The Sexual Encounter

As students at Boston College, John Doe and Jane Roe ("Roe") met during their freshman year. A.498. While they did not communicate regularly, they were on friendly terms and exchanged greetings when they happened to see each other. A.498. At about 1:30 a.m. on November 4, 2018, Doe saw Roe waiting in line to get food. A.498-499. Roe smiled or waved at him, and Doe and his three friends joined her in line. A.499. Doe did not recall any physical contact with Roe at this time, aside from perhaps greeting each other, as they had in the past, with an ordinary hug to say hello. A.499. The two had a normal and coherent conversation as they stood in line for food along with Doe's friends. A.499. As they talked and stood near each other, Doe got the impression that Roe was focusing her attention on him and flirting with him. A.499. Roe offered to buy food for Doe and his friend and they accepted. A.499.

Once they purchased the food, the group of five students (Doe, Roe, and Doe's three friends) decided to walk back to Doe's suite to eat their food there. A.499. Roe exhibited no difficulties walking and no other signs of incapacitation, as she engaged in conversation with one of Doe's friends. A.499. When they arrived at the suite, one student in the group went to his own room in the suite, leaving Doe, Roe and two of Doe's friends in the common room, where they talked and ate. A.499. After

a few minutes, Doe's two friends also left the common room, leaving Doe and Roe alone there. A.499. Doe asked Roe if she wanted to go into his room and she responded, "Yes." A.499. The two then entered Doe's room, where Doe stood on a chair to climb onto his bed, which was elevated several feet off the floor. A.499. Roe followed him onto the bed. A.499. After talking for a few minutes on the bed, Doe and Roe started to kiss. A.500. They then lay down, continued kissing, and began rubbing their bodies against each other. A.500. Roe asked Doe to kiss her neck, which he did. A.500. She then said, "I know you want to do it." A.500. Doe understood Roe to be referring to sexual intercourse. A.500. Roe then arched her back to assist Doe in removing her spandex shorts. A.500.

Roe instructed Doe to "get a condom." A.500. Doe got off the bed and retrieved a condom from his wallet. A.500. When he returned to the bed, he did not put the condom on immediately, at which point Roe stated, "Other people have done that [had sex without a condom]," to which Doe responded, "I wouldn't do that." A.500. Roe told Doe not to remove her underwear, and instead she pulled her underwear to the side using her hand. A.500. Doe put the condom on. A.500. Roe instructed him to "do it," and he penetrated her vagina with his penis. A.500. Roe told him to "go slow" because it had "been a while." A.500. They engaged in sexual intercourse in missionary position for five to seven minutes, during which Roe told Doe to kiss her neck and gave him verbal instructions, including "go slow" and "keep

it there." A.500. Doe asked Roe to flip onto her stomach. A.501. She replied that she did not want to because she "did not want [him] to cum too fast." A.501. When Doe told her that he would not do so, she turned over onto her stomach. A.501.

After approximately two to three minutes having sex in this position, Roe told Doe that her back hurt. A.501. She did not ask him to stop, but the intercourse ceased. A.501. They both got off the bed and got dressed. A.501. Doe walked Roe through the common room to the door of the suite, where they said goodbye. A.501. Roe also said goodbye to one of Doe's roommates, Roommate 1, who was sitting in the common room. A.501.

A month later, on December 4, 2018, Doe and Roe's mutual friend told Doe that Roe was "thinking of coming forward with sexual charges" against Doe. A.501. Roe had told this friend that she had "blacked out" during their encounter and only recalled asking Doe to get a condom. A.501. Doe texted Roe, asking if she would meet to discuss the night of November 4. A.501. Roe responded the following day and agreed to meet. A.501. Doe and Roe met in the dining hall on December 7, 2018 and discussed their substantially differing recollections of the encounter. A.501.

During this conversation, Roe said that she was upset that Doe had not spoken to her at a football game that they both attended the weekend after the encounter. Doe did not recall seeing her there. A.501. Roe also said that she was very upset that he had "ignored" her when she requested that he return the shorts she had left in his

room. A.501. This meeting was the last communication that the two had with each other. A.501.

II. The Boston College Adjudication

A. The Boston College Policies and Context

The Boston College Student Sexual Misconduct Policy, in effect during the 2018-19 academic year, prohibited "sexual assault," defined as "any sexual contact or sexual penetration with another individual without consent." A.105. It defined "consent" as "clear and voluntary agreement to engage in particular sexual activity, communicated through mutually understandable words or actions." *Id.* BC understands and refers in its brief to this standard as "affirmative consent." Brief for Defendant-Appellant BC, at 2. In a different paragraph, the policy additionally provided: "Consent cannot be obtained from an individual who is incapable of giving consent because the person . . . is incapacitated, including through the consumption of alcohol or drugs," A.106, meaning that BC does not consider any purported agreement to sex that may be made by an incapacitated individual to constitute valid consent.

The Student Sexual Misconduct Policy is part of the Boston College Code of Student Conduct, which provides: "The student conduct system exists to protect the rights of the Boston College community and assure *fundamental fairness* to the complainant and to the respondent." A.278 (emphasis added). Consistent with this

fairness promise, in general when a student is charged with misconduct, BC affords parties a live hearing before a hearing officer, a Student Conduct Board or an Administrative Hearing Board. A.278-279. At such a hearing, both parties may appear before the decisionmaker or decisionmakers, make opening and closing statements, present and hear evidence, present witnesses, answer questions, and pose questions to be asked of witnesses. *Id.*

But in sexual misconduct cases—*and only in such cases*—BC denies students these essential procedural safeguards. A.102-117; A.279. Before 2014, sexual misconduct cases were adjudicated like other misconduct cases at BC, through a live hearing before an Administrative Hearing Board. Brief for Defendant-Appellant BC, at 3 n.2 (citing A.377). But in 2014, *for sexual misconduct* cases only, BC abandoned the hearing model for student discipline that it continues to use to "assure fundamental fairness to the complainant and to the respondent" for allegations of non-sexual misconduct. *Id.*; A.278. In 2014, BC adopted instead what is known as an "investigator only" or "single-investigator" model of adjudication, only for sexual-misconduct discipline. Brief for Defendant-Appellant BC, at 3 n.2.

Many universities did the same the years following the 2011 "Dear Colleague Letter," a non-binding guidance document in which the Department of Education's Office for Civil Rights ("OCR") revealed that universities' disciplinary systems, for complaints of sexual assault, were governed by OCR's interpretations of what

constitutes procedures that comply with Title IX of the Education Amendments of 1972. *See* Dear Colleague Letter: Sexual Violence, Russlyn Ali, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) ("2011 Dear Colleague Letter"). This guidance document was withdrawn in 2017,[2] but it remains common ground that Title IX requires colleges and universities that receive federal funding, such as BC, to adopt policies to address sexual harassment including sexual assault, and to decide resulting disciplinary matters equitably, without discrimination on the basis of sex.[3]

In 2014, OCR began publishing a rolling list of colleges and universities that it was investigating, and threatened to defund any schools it found to be not in compliance with OCR's interpretations of Title IX's requirements. In 2015, BC was added to that list, which grew to have over three-hundred schools, before OCR unpublished the list in 2017. Universities responded to the pressure of the defunding threat by scrambling to adopt measures that they thought might satisfy the federal government, given what could be gleaned from its statements, even if not legally

[2] *See* Dear Colleague Letter, Candace Jackson, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017) ["2017 Dear Colleague Letter"] (withdrawing Dear Colleague Letter: Sexual Violence, Russlyn Ali, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) ["2011 Dear Colleague Letter"], and Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Dep't of Educ. (2014) ["2014 Q&A"]).

[3] *See* Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

required. BC's changes in 2014, just for sexual misconduct complaints, deviated from hearing-based processes that it maintained for discipline that did not involve sex or gender. The "investigator-only" model of adjudication for sexual misconduct was a measure that some schools adopted in response to perceived federal pressure.[4]

In BC's "investigator-only" process, the roles of investigation and adjudication are collapsed into one person or several persons. A.112-114. Those who investigate the charge interview parties and witnesses seriatim, make credibility determinations, and make the decision on whether the accused is responsible for the alleged misconduct. *Id.* The parties are each individually interviewed by investigators behind closed doors, but there is no live hearing or meeting with the decisionmakers in which complainants and respondents can both hear, in real time, each other's statements and answers to questions, and can respond in real time with questions of their own to be put to the other party. *Id.* This absence precludes the parties from meaningfully probing the credibility of one another in front of decisionmakers, even through a neutral hearing officer or panel.

[4] *See* Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault 14 (2014) (warning that "[m]any sexual assault survivors are wary of their school's adjudication process" because they may "subject them to harsh and hurtful questioning," and touting "new models" for "investigating and adjudicating campus sexual assault cases," "like having a single, trained investigator do the lion's share of the fact-finding," as "promising" and as offering "very positive results").

B. The Investigation

On December 11, 2018, Doe received a mutual Stay Away Order from Associate Dean of Students Corey Kelly, prohibiting him from having any contact with Roe. A.502. On January 23, 2019, Doe received a Notice to Appear from Assistant Dean of Students Kristen O'Driscoll stating that she was "in receipt of a report of alleged violations of the Boston College Code of Student Conduct" in relation to the November 4, 2018 encounter, and identifying the Sexual Misconduct Policy as the policy that Doe was accused of violating. A.451-452. The Notice specified that Doe was accused of "engaging in non-consensual sexual contact through kissing and touching of intimate body parts and penetrating her vagina with [his] penis without her consent while [Roe] was incapacitated." *Id.* He was additionally accused of "non-consensual touching" of Roe at the dining establishment where Doe and Roe had talked while standing in line. *Id.* The Notice specifically stated: "If during the investigation there are additional allegations, we would provide an updated notice to you." *Id.*

The Investigators, Dean O'Driscoll and Jennifer Davis, of the firm Jenn Davis, LLC, conducted an initial interview of Doe on January 29, 2019, and a second interview of Doe on March 11, 2019. A.517-518. At no time during the investigation was Doe permitted to submit questions for Roe, either directly, or for the Investigators to ask her.

On April 5, 2019, Dean O'Driscoll notified Doe that the evidence binder related to the investigation was available for his review. A.521. On April 18, 2019, Doe submitted comments on the binder, which did not reveal any credible evidence to support a finding of responsibility for a policy violation. A.453-469; A.522. Specifically, the evidence demonstrated that (i) Roe did not lack the capacity to consent to the sexual encounter, and (ii) she was an active participant who had clearly and voluntarily agreed to have sexual intercourse with Doe. *Id.*

C. The Finding and Sanction

On or about June 11, 2019, the Investigators submitted to Dean Kelly and to Associate Vice President of Student Affairs and Title IX Coordinator Melinda Stoops the Confidential Investigatory Report ("Report"), which found, by a preponderance of the evidence, that Doe "neither knew, nor should be reasonably have known, that [Roe] was incapacitated by alcohol during his sexual interaction with her." A.274. The Report also found that Roe's "words and actions" did express "clear and voluntary consent to [Doe] to engage in kissing, lying on his bed with bodies touching, and his removal of her shorts," in keeping with BC's affirmative consent policy. *Id.* But the Report then found that Roe "did not say anything . . . that constituted 'clear and voluntary agreement' to penetrate her vagina with his penis" -- that is, she did not express affirmative consent specifically to the penetration. *Id.* The Investigators based this determination on their not finding credible Doe's

testimony that Roe pulled her own underwear aside and told him, "Do it," and instead finding credible Roe's denial of Doe's descriptions of her expressions of affirmative consent to penetration. A.272-273. The Report concluded that it was more likely than not that Doe penetrated Roe without her "clear and voluntary agreement." A.274. It found Doe responsible for "Sexual Assault, as defined by the Policy." A.275.

On June 18, 2019, Doe received a Resolution Letter from Dean Kelly notifying him that she and the Student Affairs Title IX Coordinator had approved the Report. A.470-471. The letter stated: "While the investigators concluded that you did not know, nor that you reasonably should have known that [Roe] was incapacitated by alcohol, they found, by a preponderance of evidence, that [Roe] did not provide consent for you to penetrate her vagina with your penis." *Id*. The letter informed Doe that he was suspended from BC, effectively immediately, through May 18, 2020, and that the suspension would be noted on his academic transcript. *Id*. It also stated that upon his return to BC after the suspension, he would be placed on University Probation for one year. *Id*.

D. The Appeal to Boston College

On June 27, 2019, Doe timely submitted to BC an appeal of its finding, on the grounds that (1) BC committed material procedural errors that were likely to adversely affect the result of the conduct adjudication, and (2) Doe had become

aware of new evidence that was unavailable to him at the time of the adjudication process, and that would have likely affected the finding. A.149-166; A.283 (BC policy providing "Violation of Procedure" and "Previously Unavailable Information" as grounds on which "appeals will be accepted").

Among the several procedural objections that Doe raised on appeal to BC, the one that eventually became the focus of the District Court's grant of preliminary injunction was that BC's adjudication process did not afford Doe any opportunity to have his questions put to his accuser in a hearing. A.171.

Doe also objected particularly to the fact that the Investigators found him responsible for a charge that was different from the charge that BC had notified him was being investigated. In the Notice to Appear on January 23, 2019, Doe was charged with engaging in sexual contact with Roe while she was *incapacitated and thus unable to consent*. A.128. But when that allegation turned out to be unsupported by the evidence, the Investigators decided to find him responsible for a distinctly different violation that was logically inconsistent with the original one alleged. That new alleged violation, previously unknown to Doe, was that only the narrow act of penetration within the sexual encounter was without Roe's "clear and voluntary agreement," though the Report simultaneously found that Roe's "words and actions" *did* express "clear and voluntary consent to [Doe] to engage in kissing, lying on his bed with bodies touching, and his removal of her shorts." A.274. The Investigators

engaged in a bait and switch, and moved from investigating one allegation to a different allegation without ever notifying Doe, contrary to BC's specific promise in the Notice to Appear that, "If during the investigation there are additional allegations, we would provide an updated notice to you." A.128. With this lapse, BC failed to comply with OCR's 2017 guidance specifying that schools must provide not only "written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy," but also "sufficient details" including "*the precise conduct* allegedly constituting the potential violation." Q&A on Campus Sexual Assault, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 2017) (emphasis added).

The lack of opportunity for the parties to put questions to each other in real time compounded the failure to provide the updated notice of allegations. Doe directed his focus in interviews to his recollection of Roe's lack of incapacitation during their encounter. After all, an incapacitated person's expressions of consent, no matter how affirmative or explicit, is vitiated or irrelevant because that person is incapable of consenting. Therefore, Doe reasonably did not think it important to focus on Roe's specific verbal and physical signals of affirmative consent to the act of penetration. The lack of opportunity to engage in real-time questioning about her recollections meant that he could not become aware of the shape-shifting of the complaint, from intoxication to a lack of affirmative consent specific to penetration.

Yet the Investigators' finding of responsibility rested significantly on Doe's mention of those recollections only at his second interview. A.573-575. Had he been given an opportunity to listen to Roe and propose questions for her in real-time, Doe would have understood and addressed how the complaint against him was evolving away from the initial notice, and the Investigators likely would not have been able to draw the same adverse inference about his credibility for not mentioning some key facts at first. A real-time opportunity to hear Roe and have his questions put to her in a responsive process would have provided the chance to question the credibility of the key claim that she did not affirmatively consent to penetration.

Moreover, having belatedly learned, upon reading the Report on June 18, 2019, the actual charge for which he was investigated and found responsible, Doe subsequently learned of new evidence that was not available to him previously. Specifically, a witness, Roommate 1, who was previously interviewed by the Investigators confided in Doe that he had been present in the suite during the sexual encounter and had heard "unambiguous sounds of consensual sex" from both parties. Doe described this new evidence in his appeal. A.488.

On July 24, 2019, Vice President for Student Affairs Joy Moore denied Doe's appeal. A.490-496. On the issue of the opportunity to have his questions put to Roe, Vice President Moore stated that "no such rights exist for students at BC." A.171. On the issue of notice, she asserted that "there is no reason to believe that the alleged

lack of notice caused [Doe] to withhold any evidence of consent." A.168. Further, Moore refused to accept an appeal on the ground of previously unavailable information, the new testimony from Roommate 1. A.172. She asserted that this information was "available" earlier, even though Roommate 1 had not given the information to the Investigators and it was not available to Doe at the time of the adjudication process. *Id.* As a result, Doe was suspended for the 2019-20 academic year.

III. The District Court's Preliminary Injunction

On July 29, 2019, Doe filed this action alleging, *inter alia*, that the procedural unfairness of BC's sexual misconduct disciplinary process in his case violated Title IX and breached the University's contractual and common law duty of basic fairness in disciplinary proceedings. A.8-58.

On August 20, 2019, the District Court ruled from the bench and issued a preliminary injunction staying the suspension. A.427-437. Noting that "the law is developing in the area," Judge Douglas Woodlock said he was "comfortable enough . . . staying the suspension" of Doe, based on the likelihood of success on the merits of Doe's "fair process" claim. A.429. Judge Woodlock "treat[ed] *Haidak* as a matter of considerable significance," on what universities do when "confronted with genuine issues of material fact as to which a credibility determination has to be made

on a fundamental issue" – in Doe's case, whether a student engaged in sexual conduct without affirmative consent. A.430.

Judge Woodlock clarified that what was at issue here was not the type of adversarial "cross-examination" seen in criminal trials, but rather, "the opportunity to observe together and ask questions or ask that the factfinder ask question with respect to the core issues." *Id.* He said that the fact that BC's process did not provide that opportunity was "a fundamental deficiency in the wake of *Haidak*." *Id*. He noted that "credibility determinations are being made by the investigators without the benefit of real-time cross-examination that may consist of questions that are asked by the parties, to be asked by the factfinder." *Id.* Rather, the investigators are "making those kinds of determinations in seriatum questioning of witnesses." *Id.* Judge Woodlock reasoned: "The developing case law in this area . . . satisfies me that *Haidak* is an important statement on the part of the First Circuit about what is fundamentally necessary when there is a disputed question that can only be resolved on the basis of credibility. Certainly, the two principal parties involved . . . should be subject to some form of real-time examination with questions" from each other. A.432. While Judge Woodlock emphasized that it was unnecessary to have the questioning done by lawyers or directly by the parties in a courtroom style, he held that "some mechanism for that real-time evaluation . . . is necessary; and in its absence, the process is deficient." *Id.*

Judge Woodlock further held that "a private institution like BC should follow practices that we'll call fair process" and that "fair process directs that when credibility of a central issue in a case such as this is presented, the process has to enable the factfinder to evaluate the credibility of the respective claims by a real-time process at which both of the respective parties are present and have the opportunity to suggest questions." A.433. Therefore, "finding a substantial deficiency that grows out of *Haidak* and the teachings of *Haidak*, which frankly are consistent with . . . developing law," the District Court concluded that there was a likelihood of success on the merits on Doe's "fair process" claim. A.436.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in entering a preliminary injunction staying Doe's suspension from BC. It did not err in concluding that Doe is likely to succeed on the merits of his contractual basic fairness claim. BC's Code of Student Conduct explicitly promises to provide "fundamental fairness to the complainant and to the respondent." That express promise of basic fairness is no less robust than the implied contractual duty to provide basic fairness that binds all higher education institutions in Massachusetts. *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 87 (1st Cir. 2018). The District Court recognized that what basic fairness consists of in the university discipline context has been developing in courts in this jurisdiction and other jurisdictions. This Court's recent case, *Haidak v. University of Massachusetts-Amherst*, stated, that "a university" cannot "fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account, and that "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" 933 F.3d at 69. The District Court reasonably understood that this Court's reasoning on procedures that are essential to fairness and due process in *Haidak* is significant for interpreting what fundamental fairness means for private universities. Its conclusion, that basic fairness requires a private university to provide parties in serious disciplinary matters, where credibility is a

core issue, some real-time mechanism for raising questions to be put to each other, is consistent with *Haidak* and with the conclusions of a growing number of courts in other jurisdictions.

STANDARD OF REVIEW

A district court's grant of a preliminary injunction is reviewed for abuse of discretion. *OfficeMax, Inc. v. Levesque*, 658 F.3d 94, 97 (1st Cir. 2011). Factual findings are reviewed for clear error, and questions of law are decided de novo. *Id.* If the legal question is "close," a reviewing court "should uphold the preliminary injunction and remand for trial on the merits." *Ashcroft v. ACLU,* 542 U.S. 656, 664-65 (2004). This Court may also affirm the District Court's preliminary injunction order on grounds different from the ones on which a district court relied. *State Police for Automatic Retirement Assoc. v. DiFava*, 317 F.3d 6 (1st Cir. 2003).

ARGUMENT

This Court should leave in place the District Court's preliminary injunction because the District Court did not abuse its discretion in granting it. The District Court did not err as a matter of law in its ruling on Doe's likelihood of success on the merits of his contractual fair process claim.

I. Boston College Has a Contractual Duty to Provide Fundamental Fairness to Students in its Disciplinary Process.

Massachusetts law obligates institutions of higher education to provide a fundamentally fair disciplinary process to their students. *Coveney v. President & Trs. of Coll. Of Holy Cross*, 388 Mass. 16, 445 N.E.2d 136, 139 (1983). The First Circuit has directly addressed this obligation in a recent case involving the same defendant as in the present case, BC. *Bos. Coll.*, 892 F.3d 67. A BC student who was suspended for alleged sexual misconduct claimed that BC failed to provide him a fair process. *Id.* This Court stated that an "implied covenant of good faith and fair dealings imposed on every contract by Massachusetts law, applied in the context of school disciplinary proceedings, creates an independent duty to provide basic fairness." *Id.* at 87 (citing *Uno Rests., Inc. v. Bos. Kenmore Realty Corp.*, 441 Mass. 376, 805 N.E.2d 957, 964 (2004)). The First Circuit reversed a grant of summary judgment for BC, after it found genuine issues of material fact, on BC's alleged failure to provide a fair process in breach of its contractual duties. Upon remand, at trial, a jury found against BC and awarded the student plaintiff $100,000 in damages. Importantly, the First Circuit in that case made clear that Massachusetts contract law "creates an independent duty to provide basic fairness" that binds all universities including BC. *Bos. Coll.*, 892 F.3d at 87.

BC, though, has apparently failed to assimilate the basic fairness obligation recognized in this Court's recent BC case. The centerpiece of BC's argument in this

Court is that the obligation to provide basic fairness to its students is satisfied so long as BC simply follows its own procedures as set out in its Student Conduct Code, without any regard to whether or not those adopted procedures are actually fair. This is incorrect and illogical. For example, what if a school's written policy announced that students accused of misconduct will not be told the allegations or shown the evidence gathered, or that a determination of responsibility will be made without talking to the complainant or the respondent? On BC's logic, as long as the school faithfully followed those very procedures, it should be deemed to have provided basic fairness. On BC's view, a school's slavish adherence to any manifestly unfair procedures it adopted would, absurdly, have to result in a determination that the process the school used was fundamentally fair.

BC rests its argument on language that it quotes from *Doe v. Boston College*, which it plainly misreads. In that case, after stating that state contract law "creates an independent duty to provide basic fairness," the First Circuit also said, "whenever a school *expressly promises no less than basic fairness*, which is the case here, the school's implied duty becomes superfluous and the court's analysis to ensure that the disciplinary proceedings were 'conducted with basic fairness,' focuses on assuring *compliance with the express contractual promise*." 892 F.3d at 87 (quoting *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) (emphasis added). BC misreads that language to mean that when BC made its commitment to fairness

explicit and expressly promised "fundamental fairness" in its Code of Student Conduct, that choice had the legal effect of *freeing* BC from the "independent duty to provide basic fairness" that would otherwise apply, so that all that is left to analyze is whether BC followed its own procedures. Brief for Defendant-Appellant BC, at 18. BC seemingly believes that its promise of "fundamental fairness" is simply synonymous with whatever its written procedures provide, and does not require any external fairness check on BC's procedures. BC's apparent claim is that its procedures, so long as they are followed, are by definition fundamentally fair.

This Court meant nothing of the kind in *Doe v. Boston College*. Rather, the Court plainly stated that the already existing *implied* duty to provide basic fairness turns into an *express* duty, where a school expressly promises "fundamental fairness," as BC did and still does. *Bos. Coll.*, 892 F.3d at 87. This Court's language saying that the "implied duty becomes superfluous," does not mean that the content of that fairness duty disappears. *Id.* Rather, this Court called it "superfluous," because the express duty of basic fairness created by the school's explicit promise of "fundamental fairness" does the *same* work as, if not greater work than, the implied duty of basic fairness that applies to all school disciplinary proceedings; it would thus be "superfluous" for a court to focus analysis on both, rather than on one or the other. *Id.* Therefore, the court's analysis "focuses on assuring compliance with

the express contractual promise" – here, BC's explicit promise of "fundamental fairness." *Id.*

BC would have this Court believe that when it expressly promises students "fundamental fairness," that phrase adds nothing to the promises BC already makes in its other provisions of the Student Code of Conduct detailing the standards and procedures that BC uses for disciplinary matters. Yet, if that promise of fairness is to have any content at all, it must be more than merely a promise to follow the procedures that a school sets out. Of course, a school's *failure* to follow its own procedures is highly relevant to a determination that it failed to provide basic fairness. *See, e.g.*, *id.* at 86 ("[B]asic fairness excludes having an associate Dean of Students tell the Board Chair in the middle of deliberations that one of the verdict options favorable to the student (''no finding'') was discouraged by the Dean of Students."); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44 (2018) (finding "unfairness is magnified when the general counsel is allowed to make formal evidentiary objections, which UCSB's policies and procedures do not permit"); *Montague v. Yale Univ.*, 2017 WL 4942772 (D. Conn. 2019) (denying summary judgment to Yale on the issue of its intentional manipulation of its sexual misconduct procedure in breach of contract). But it does not follow that a school's success at following its own procedures, however unfair they may be, would automatically amount to success at providing basic fairness. *Doe v. Boston College* did not reduce

a court's role, of "assuring compliance with" basic fairness, down to merely checking that a school followed its own procedures even if they are unfair. Indeed, that result would be wholly counter to what this Court held.

II. Fundamental Fairness Requires Some Real-Time Opportunity to Have a Party's Questions Put to the Other Party.

Given that BC's contractually binding promise of "fundamental fairness" *does* have meaning beyond simply following BC's existing procedures, the meaning of that contractual term is governed by the "reasonable expectations" test, announced by the First Circuit in 1983, *Cloud*, 720 F.2d at 724, and subsequently adopted by Massachusetts courts, *Schaer v. Brandeis Univ.*, 432 Mass. 474, 735 N.E.2d 373, 378 (2000) (adopting the "reasonable expectations" test and quoting *Cloud*). Consistent with the rule in Massachusetts that "[i]f a contractual provision is ambiguous, we construe it against the drafter," *DeWolfe v. Hingham Ctr., Ltd.*, 985 N.E.2d 1187, 1195 (Mass. 2013), the "reasonable expectations" test requires a court to "ask 'what meaning the party making the manifestation, the university, should reasonably expect the other party[, the student,] to give it.'" *Bos. Coll.*, 892 F.3d at 80 (quoting *Walker v. Pres. & Fellows of Harvard Coll.*, 840 F.3d 57, 61 (1st Cir. 2016)) (alteration in original). "'[I]f the facts show that the university has "failed to meet [the student's] reasonable expectations"' the university has committed a breach." *Bos. Coll.*, 892 F.3d at 80 (quoting *Walker*, 840 F.3d at 61-62 (quoting *Schaer*, 735 N.E.2d at 378)) (alteration in original).

BC failed to meet Doe's reasonable expectations of fundamental fairness and thereby breached its contract. The District Court focused on BC's failure to provide any procedural mechanism that enables the factfinder to evaluate the parties' credibility "by real-time process," during which both parties "have the opportunity to suggest questions" to be asked of each other. A.433. This real-time questioning process is essential where a dispute between parties on a central issue, such as the presence or absence of consent, is resolved on the basis of credibility. The District Court found that BC's Investigators made credibility determinations "without the benefit of real-time cross-examination that may consist of questions that are asked by the parties, to be asked by the factfinder." A.430. BC's adjudication process, which involves investigative interviews, or "seriatim questioning of witnesses" by investigators, *id.*, did not enable parties to put questions to each other at all, much less in real time.

It is crucial to recognize that in *Doe v. Boston College,* the case on which BC now heavily relies, BC *had*, in 2012, given the student proper notice, a live hearing, and the opportunity for real-time questioning of the kind that was lacking in the present case, and in all sexual misconduct cases at BC since 2014. Therefore, nothing in that case remotely suggests that BC could deny core procedural safeguards without breaching its promise of fundamental fairness. On the contrary, that case reaffirmed the "reasonable expectations" test, and under that test, BC failed to meet

Doe's reasonable expectation that he would be afforded a fundamentally fair process.

The District Court's ruling, that an opportunity for real-time questioning is essential to fair adjudication of serious student discipline cases centering on credibility, joined a growing set of both federal and state court cases across the country that have similarly reasoned that credibility determinations in the absence of such a procedure is so unreliable and prone to risk of error or bias as to violate basic fairness obligations of *private* universities. *See, e.g.*, *Doe v. Allee*, 30 Cal. App. 5th 1036, 1039 (2019) ("[F]undamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments."); *Doe v. Univ. of So. Cal.*, 29 Cal. App. 5th 1212, 1237 (2018) ("[A]s part of the adjudicator's assessment of credibility, an accused student must have the opportunity indirectly to question the complainant."); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1057 (2018); ("[T]he Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her

appropriate questions proposed by John or the Committee itself."); *Doe v. Rhodes Coll.*, No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019) ("When a disciplinary decision relies on any testimonial evidence in a case where credibility is in dispute and material to the outcome, due process requires an assessment of credibility through cross-examination."); *cf. Doe v. Brandeis*, 177 F.Supp.3d 561, 604-05 (D. Mass 2016) (stating that "the elimination of such a basic protection for the rights of the accused" as cross-examination "raises profound concerns," and that "the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding"). The Sixth Circuit has held, as a matter of constitutional due process, that in disciplinary cases that turn on credibility determinations, public universities must provide for cross-examination directly by the party or the party's representative. *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).[5]

[5] In its notice of proposed rulemaking on regulations implementing Title IX of the Education Amendments of 1972, the Office for Civil Rights has specified that cross-examination of parties and witnesses, conducted by a party's representative, and not the party himself or herself, at a hearing, is required in a formal adjudication process. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61474 (Nov. 29, 2018). The 2011 Dear Colleague Letter had also "strongly discourage[d]] schools from allowing the parties personally to question or cross-examine each other during the hearing," but not from having hearings or allowing parties to put questions to each other through a hearing panel. *See* 2011 Dear Colleague Letter, *supra* note 2, at 12.

As the District Court recognized, this Court's decision in *Haidak* was "an important statement on the part of the First Circuit about what is fundamentally necessary when there is a disputed question that can only be resolved on the basis of credibility." A.432. In *Haidak* this Court made clear that "a university" cannot "fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account." 933 F.3d at 69. The First Circuit declined to go as far as the Sixth Circuit and require direct cross-examination by the party or the party's representative, but this Court agreed with the Sixth Circuit that affording "no testimonial hearing at all," or a "complete absence of any examination before the factfinder," would be "procedurally deficient." *Id.* The Court was "not convinced that the person doing the confronting must be the accused student or that student's representative" to assure fairness, because of the reasonable worry about "displays of acrimony or worse," and about an inadvisable "mimicry of a jury-waived trial." *Id.* at 69-70. But importantly, the Court said the opportunity to have a party's questions asked of the other party should nonetheless be provided while avoiding those pitfalls. It specified that "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Id.* at 69. That is, consistent with due process, real-time questioning of a complainant and a respondent in a university disciplinary setting could be conducted through a "neutral party," namely

the adjudicator hearing the case, to whom a party could convey questions to ask the other party in real time. *Id.*

Haidak's reasoning about what due process requires informed the District Court's reasonable interpretation of the term "fundamental fairness" in BC's contract with its students. BC's Amici appear to misunderstand Judge Woodlock to imply that private universities are subject to the Due Process Clause. Brief for *Amicus Curiae* Trs. of Amherst Coll. et al, at 3-4. But the District Court did not hold that *Haidak*'s constitutional holding covers private schools like BC. Instead, Judge Woodlock explained that the court's interpretation of a university's contractual "fair process" obligation was influenced by "the teachings of *Haidak*." A.436. Those teachings reasonably informed the interpretation of fundamental fairness in private universities' student discipline processes even though *Haidak* was a constitutional case about fundamental fairness in a public university's student discipline process. Fundamental fairness is a bedrock concept that undergirds both constitutional due process and contractual basic fairness. Therefore, it was entirely reasonable for Judge Woodlock to look to "*Haidak* as a matter of considerable significance," and to see in it "an important statement on the part of the First Circuit about what is fundamentally necessary" to meet minimum expectations of fair adjudication of serious student disciplinary matters. A.430. Indeed, it would likely have been an abuse of discretion for the District Court to issue a ruling on the question before it

without considering *Haidak*'s significance to the meaning of fundamental fairness in this case.

Moreover, hundreds of cases state that "fundamental fairness" is what due process requires. *See, e.g.*, *Clark v. Arizona*, 548 U.S. 735, 771 (2006) (stating that "fundamental fairness" is what "due process requires"); *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (referring to "the fundamental fairness that the Due Process Clause requires"); *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (the "due process guarantee of fundamental fairness"); *Bearden v. Georgia*, 461 U.S. 660, 667 n.7 (1983) ("fundamental fairness—the touchstone of due process") (citation omitted); *Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) ("due process test of fundamental fairness"); *Oken v. Warden*, 233 F.3d 86, 88 (1st Cir. 2000) ("due process guarantee of fundamental fairness") (citation omitted); *Katz v. King*, 627 F.2d 568, 575 (1st Cir. 1980) (referring to "the due process requirement of fundamental fairness"). *See also* Black's Law Dictionary 697 (8th ed. 2006) ("fundamental fairness" is "commonly considered synonymous with due process."). Some courts have even treated "fundamental fairness" and "due process" as synonymous. *See, e.g., Terminiello v. N.J. Motor Vehicle Comm.*, 2011 WL 6826128, at *8 (D.N.J. Dec. 27, 2011) ("Fundamental fairness is synonymous with due process."); *In re Brandi B.*, 743 S.E.2d 882, 891 (W. Va. 2013) ("Due process of law is synonymous with fundamental fairness.") (citation omitted); *In re Interests*

of D.M.D., 195 N.W.2d 594 (Wis. 1972) ("[D]ue process is an exact synonym for fundamental fairness.") (citation omitted).

It cannot be unreasonable to interpret a contractual term to mean what hundreds of courts have said it means. BC students had a reasonable expectation that BC's explicit assurance of "fundamental fairness" was an assurance that BC would honor the minimum procedural safeguards that due process requires. BC cites *Doe v. Trustees of University of Pennsylvania*, 270 F. Supp.3d 799, 812 (E.D. Pa. 2017), for the proposition that a university's promise of fairness creates no duties or expectations other than that the school will follow the specific provisions of its own disciplinary procedures. Brief for Defendant-Appellant BC, at 18-19. But in fact, *University of Pennsylvania* held that where, as here, a private university "voluntarily contracted to provide a disciplinary process that was 'fundamentally fair,'" that contractual term is interpreted "as it is used by courts . . . setting forth the standard of *fundamental fairness for disciplinary proceedings at State universities*." 270 F.Supp.3d at 812 (emphasis added).

In light of "the developing case law in this area," which increasingly points to the importance of real-time questioning for fundamental fairness at public *and* private schools, A.430, it was reasonable, and certainly not an abuse of discretion, for the District Court in this case to determine that BC's failure to afford a party

"some mechanism" for submitting questions in real-time to be asked of the other party made the adjudication procedurally deficient. A.432.

BC claims that because Massachusetts courts have not obligated private educational institutions to provide a "formal hearing" for student discipline, they therefore cannot be obligated to provide "one involving cross-examination." Brief for Defendant-Appellant BC, at 21 (citing *Coveney*, 445 N.E.2d at 140; *Driscoll v. Bd. of Trs. of Milton Acad.*, 70 Mass. App. Ct. 284, 873 N.E.2d 1177, 1187 (2007)). The key to basic fairness in university discipline, however, is not a "formal hearing" similar to a courtroom hearing or trial. It is, rather, a process that affords a meaningful opportunity to be heard. In a case where credibility is a core issue in the search for the truth, and serious discipline is at stake, the parties' opportunity to participate in probing that core issue is paramount. That need not occur in a trial-type hearing or an event that would be considered a "hearing" in any traditional sense. It might take many different possible forms, ranging from a real-time video or telephone conference meeting, to keeping parties separate with a curtain or barrier, to an in-person meeting involving both parties and the adjudicator. The real-time meeting could be informal or structured. Schools could choose to employ or not employ various elements such as opening and closing arguments, presentation of other witnesses, or strict speaking-time limits. Not all of the possible permutations that would result would be recognizable as a "formal hearing."

BC's Amici express worry about the imposition of "uniform student disciplinary proceedings" on the large range of different kinds of higher education institutions in this jurisdiction. Brief for *Amicus Curiae* Trs. of Amherst Coll. et al., at 5. But that concern is a straw man, because there are many different possible mechanisms, consistent with schools' autonomy and academic freedom, for providing the real-time questioning opportunity in a disciplinary proceeding. It is no more an imposition of uniformity than the demand that students be provided notice of allegations against them. Schools may vary in size, missions, student populations, specializations, resources, or locations, and features of their disciplinary process may reflect such differences. But schools do not have the freedom to vary when it comes to the minimum requirements of fundamental fairness in compliance with state or federal law. What the District Court recognized, after *Haidak,* is that when credibility is a core issue and yet a party cannot observe, listen to, and raise questions for the other party that goes to that core issue, his or her opportunity to be heard is so impaired that it cannot be considered fundamentally fair.

The District Court, following *Haidak*, made explicit that what is contemplated is *not* trial-type adversarial cross-examination in a formal hearing, but rather "some mechanism" for affording parties an opportunity for real-time questioning, not directly but indirectly, by proposing questions for each other through the fact-finder. A.432. To the extent the term "cross-examination" even captures what this Court in

Haidak and the District Court in this case described, it refers to "some opportunity for real-time cross-examination, even if only through a hearing panel," 933 F.3d 56, 69, or "real-time evaluation, cross-examination, not in the traditional form but in some form that is tailored to these circumstances," A.436-437. It need not be "adversarial" or conducted directly by parties or their representatives. There remains significant leeway for schools to determine how to meet this minimum requirement of fairness in keeping with their varying characteristics, needs, and priorities.

BC's Amici also appear to worry that the no-hearing investigator-only model of adjudication that some schools have adopted for sexual-misconduct complaints in recent years may become unviable if they had to incorporate a mechanism for real-time questioning between parties. *See* Brief for Defendant-Appellant BC, at 9. The Amici explain that OCR's 2011 Dear Colleague Letter resulted in schools' "tremendous investment of time, money, and effort," after which some institutions adopted an "investigator-led model, some a hearing-based model, and many others different hybrids of the two." *Id.* at 5.[6] But it is important not to simply conflate a

[6] BC's Amici mention that they developed their current sexual misconduct policies and procedures in reaction to OCR's 2011 Dear Colleague Letter, as if to underscore their compliance with federal guidance. Yet, they do not acknowledge that OCR withdrew that guidance in 2017 and replaced it with new guidance documents that address procedural fairness matters at issue in this case. Amici's commitment to procedures developed in response to now-rescinded guidance is in striking contrast to their silence regarding concerns expressed in the guidance that has actually been in effect for the past two years, about procedural fairness in disciplinary procedures for sexual misconduct. *See* 2017 Dear Colleague Letter,

real-time questioning opportunity with a model that necessarily involves separating the roles of investigation and adjudication. To be sure, the investigator-only model has received criticism from federal courts including the District of Massachusetts. *See, e.g.*, *Brandeis Univ.*, 177 F.Supp.3d at 606 ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions."). [7] But there is in fact no reason that the requisite real-time opportunity for questioning and credibility-testing could not take place with or before the individual who is the combined investigator, fact-finder, and decisionmaker (and sometimes even appellate body) in an investigator-only system. Similarly, while courts have increasingly concluded that only a live hearing allows university decisionmakers to assess the credibility of parties and witnesses,[8] a "hearing," in the

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supra note 2 (withdrawing 2011 Dear Colleague Letter, *supra* note 2, and 2014 Q&A, *supra* note 2); *Q&A on Campus Sexual Assault*, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 2017).

[7] In its notice of proposed rulemaking on regulations implementing Title IX of the Education Amendments of 1972, the Office for Civil Rights has specified that the investigator-only model may not be used. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61478 (Nov. 29, 2018).

[8] *See, e,g.*, *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F. 3d 393, 299-402 (6th Cir. 2017); *Doe v. Univ. of So. Calif.*, 29 Cal. App. 5th 1212 (2018); *Doe v. Claremont McKenna College*, 25 Cal. App. 5th 1055, 1070 (2018); *Doe v. Univ. of Mich.*, 325 F.Supp.3d 821, 830 (E.D. Mich. 2018); *Doe v. Alger*, 228 F.Supp.3d 713, 730 (W.D. Va. 2016); *Lee v. Univ. of New*

context of university discipline would be appropriately tailored to the circumstances and need not approach the formality, elaborateness, or expense of a trial-type hearing. The currently existing variety of adjudication models, including hybrids of investigator-only and hearing-based models, suggests that a diversity of approaches will continue after the District Court's preliminary injunction and this Court's decision in this case.

In a puzzling final argument, BC also claims that, in any event, the process that BC provided, which did not involve a real-time opportunity for the parties to pose questions to be asked of each other, still met the requirements of *Haidak*. Brief for Defendant-Appellant BC, at 24. BC asserts that its "alternating interviews of the parties" multiple times each, "in an iterative process," wherein the investigators "probed Roe's account" and informed Doe of her statements and allowed him to respond, not only satisfied *Haidak*'s requirement of "real-time cross-examination," but "was far more advantageous to Doe," since it took place over days or weeks. *Id.* at 25-27. But *Haidak*'s "real-time cross examination" is plainly not merely live interviews of each party seriatim by an investigator. Even if the investigator

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Mexico, Case 1:17- cv-01230-JB-LF, pp. 2-3 (D. NM. Sept. 20, 2018); *Doe v. U. of So. Miss.*, No. 2:18-cv—00153 (S.D. Miss. Sept. 26, 2018); *Doe v. Penn. State Univ.*, No. 4:18-CV-00164, (M.D. Pa. Aug. 21, 2018); *Doe v. Regents of Univ. of Calif.*, 28 Cal. App. 5th 44 (2018); *Doe v. Allee*, 242 Cal. Rptr.3d 109 (2019) (2nd Appl District, Div. 4).

undertook to inform each party of what the other said in their interviews, the parties would receive and respond to only what the investigator chose to convey. Rather, *Haidak* envisions that the parties would be present, hearing each other, and participating in responsive questioning, live and in real time, in the same room or using appropriate technology. *Haidak*, 933 F.3d at 69.

Indeed, had Doe been given this opportunity, the effect of the deficient notice he was given about the specific allegation he was facing would have been ameliorated. In a real-time scenario, Doe would better have realized, as he listened to Roe's testimony and responded, that the allegation, that Doe had sex with Roe while she was intoxicated and simply unable to consent, was transformed into an entirely different allegation (one inconsistent with the original allegation), that Roe did not give affirmative consent to the specific act of penetration within an otherwise consensual sexual encounter. Because Doe was the only other person present, he was uniquely situated to propose questions that could test the accuracy of Roe's recollection and the credibility of her account that either she was incapacitated and could not consent, or that she was not too intoxicated to consent but did not give affirmative consent to one specific act within an otherwise consensual encounter. Particularly in a situation of evolving allegations, it was critical that the accused party have the opportunity to understand and question that shift as it was occurring, rather than after it became solidified in the investigator's final report.

What is most puzzling about BC's resistance to the District Court's order here is that BC's own Code of Student Conduct does provide for a live hearing at which the parties have a real-time opportunity to be heard, to hear, and to ask each other questions. By BC's own interpretation of what its promise of "fundamental fairness" means in that Code, the hearing and questioning opportunity the Code provides is part of BC's assurance of fairness in student discipline – except in allegations of sexual misconduct, which tend to be the very matters in which the stakes for students are highest and credibility most central to adjudications. Whether or not BC's sexual exception to its general view of what fundamental fairness requires came in response to perceived federal pressure in 2014, the fact that BC's overall approach to discipline provides important rights that it then denies to students only in sexual misconduct cases reveals that it is singling out those complainants and respondents for worse treatment. It is irrational and unfair to single out students accused or complaining of sexual misconduct, as opposed to non-sexual misconduct, and subject them to a process in which credibility is not adequately tested and error or bias is inadequately checked. That irrational exceptionalism, just for sexual disciplinary matters, and just for sexual misconduct complainants and respondents, underscores BC's unfair treatment of those students in breach of the basic fairness duty created by the "implied covenant of good faith and fair dealings imposed on every contract by Massachusetts law." *Bos. Coll.*, 892 F.3d at 87.

CONCLUSION

This Court should affirm the District Court's grant of the preliminary injunction staying Doe's suspension from BC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: October 23, 2019

Respectfully submitted,